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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE
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12 ANYSA NGETPHARAT, JAMES
13 KELLEY,

14 Plaintiffs,

15 v.

16 STATE FARM FIRE AND
17 CASUALTY COMPANY, et al.,

18 Defendants.

19 CASE NO. C20-454 MJP

20 ORDER ON MOTIONS TO
21 EXCLUDE

22 FAYSAL A JAMA

23 CASE NO. C20-652 MJP

24 Plaintiff,

25 v.

26 STATE FARM FIRE AND
27 CASUALTY COMPANY,

28 Defendant.

29
30 This matter comes before the Court on Plaintiffs' Joint Motions to Exclude John G.

31 Lynch, Jr., Ph.D. (Ngetpharat, Dkt. No. 93; Jama, Dkt. No. 67) and M. Laurentius Marais,

1 Ph.D. (Ngethpharat, Dkt. No. 95; Jama, Dkt. No. 65) and Defendants' Motions to Exclude the
2 Supplemental Declaration of Darrell M. Harber (Ngethpharat, Dkt. No. 108; Jama, Dkt. No. 80)
3 and the Supplemental Expert Report of Paul A. Torelli, Ph.D. (Ngethpharat, Dkt. No. 110; Jama,
4 Dkt. No. 82). Having reviewed the Motions, the Oppositions (Ngethpharat, Dkt. Nos. 113, 115,
5 119, 120; Jama, Dkt. Nos. 85 87, 91, 92), Replies (Ngethpharat, Dkt. No. 117, 118, 122, 123;
6 Jama, Dkt. Nos. 89, 90, 94, 95), and all supporting materials, and having held oral argument on
7 the Motions on June 22, 2021, the Court ORDERS as follows: (1) the Court GRANTS the
8 Motion to Exclude Lynch; (2) the Court GRANTS the Motion to Exclude Marais; (3) the Court
9 GRANTS the Motion to Exclude Harber's supplemental declaration; and (4) the Court DENIES
10 the Motion to Exclude Torelli' supplemental report.

11 **BACKGROUND**

12 The Court recently ruled on the motions for class certification filed in these related cases,
13 and those orders set forth the relevant background. (See Ngethpharat, Dkt. No. 136; Jama, Dkt.
14 No. 109.) The four pending motions to exclude all relate to issues raised in the motions for class
15 certification. With their reply briefs, Plaintiffs in these actions sought to exclude the expert
16 reports of John Lynch, Jr., Ph.D. and M. Laurentius Marais, Ph.D. And Defendants ask the Court
17 to exclude the supplemental report of Paul Torelli, Ph.D. and the supplemental declaration of
18 Darrell Harber that Plaintiffs' filed with their replies in support of class certification. The Court
19 already addressed Defendants' request to strike Torelli's and Harber's supplemental items in
20 ruling on the motions for class certification.

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ANALYSIS

A. Legal Standard

“Rule 702 of the Federal Rules of Evidence provides that expert opinion evidence is admissible if: (1) the witness is sufficiently qualified as an expert by knowledge, skill, experience, training, or education; (2) the scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (3) the testimony is based on sufficient facts or data; (4) the testimony is the product of reliable principles and methods; and (5) the expert has reliably applied the relevant principles and methods to the facts of the case.” City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1043 (9th Cir. 2014) (citing Fed. R. Evid. 702.). The proponent of the expert’s opinions bears the burden of proving their admissibility. Lust By & Through Lust v. Merrell Dow Pharmas., Inc., 89 F.3d 594, 598 (9th Cir. 1996). And in evaluating challenges to the admissibility of expert opinions, the trial court acts as the “gatekeeper, not the fact finder.” Primiano v. Cook, 598 F.3d 558, 565 (9th Cir. 2010) (citation omitted). The court is “supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable.” Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d 960, 969 (9th Cir. 2013).

“The test of reliability is flexible” and the “court must assess the expert’s reasoning or methodology, using as appropriate criteria such as testability, publication in peer-reviewed literature, known or potential error rate, and general acceptance.” City of Pomona, 750 F.3d at 1044. These are not mandatory factors, and “[c]hallenges that go to the weight of the evidence are within the province of a fact finder, not a trial court judge.” Id. “Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion.” Primiano, 598 F.3d at 564 (citation omitted).

1 “Rule 702 further requires that the evidence or testimony ‘assist the trier of fact to
2 understand the evidence or to determine a fact in issue.’” Daubert v. Merrell Dow Pharm., Inc.,
3 509 U.S. 579, 591 (1993) (quoting Fed. R. Evid. 702). “Expert opinion testimony is relevant if
4 the knowledge underlying it has a valid connection to the pertinent inquiry.” Primiano, 598 F.3d
5 at 565 (citation and internal quotation marks omitted).

6 **B. Lynch**

7 Plaintiffs ask the Court to exclude Lynch’s survey of current and former State Farm
8 insureds falling within the proposed class definitions and the opinions Lynch draws from the
9 survey results. Plaintiffs argue that Lynch made methodological errors by: (1) not sampling the
10 appropriate group; (2) did not address non-response bias; and (3) failed to ask relevant questions.
11 The Court agrees with Plaintiffs as to the third point and excludes Lynch’s survey and opinions.

12 Lynch designed a survey of putative class members based on Plaintiffs’ original class
13 definitions. Of the list of 60,689 claims, he found only 50,970 of the insureds had email
14 addresses. (Expert Report of John Lynch, Jr. ¶ 14 (Ngethpharat, Dkt. No. 85-2).) After some
15 testing, he ultimately sent a survey to 4,000 randomly-sampled individuals and only 10.7%
16 completed (427) the survey. (Id. ¶ 22 and Ex. 5 to Lynch Report.) Through what looked like a
17 communication directly from State Farm, Lynch’s survey asked the following questions:

- 18 1. Did you call your State Farm insurance agent after your total loss accident?
- 19 2. Did you speak with a State Farm claim specialist after your total loss accident?
- 20 3. Were you satisfied or dissatisfied with the speed of the final settlement you received from
State Farm?
- 21 4. Were you satisfied or dissatisfied with the amount of the final settlement you received
from State Farm?
- 22 5. Did you tell State Farm that you disagreed with the dollar value of the settlement for your
totaled vehicle?

- 1 6. When you made your total loss claim, did you do your own research to figure out the fair
2 market value of your vehicle?
- 3 7. What sources did you consult to figure out the fair market value of your vehicle just prior
4 to your accident? Select all that apply
- 5 8. When you replaced your totaled vehicle, did you negotiate the price of the replacement
6 vehicle you purchased or leased?

7 (Ngethpharat, Dkt. No. 85-2 at 9-10.)

8 “Treatment of surveys is a two-step process.” Clicks Billiards, Inc. v. Sixshooters, Inc.,
9 251 F.3d 1252, 1263 (9th Cir. 2001). The Court determines whether the survey is admissible—is
10 a “proper foundation for admissibility”—and whether the survey is “relevant and conducted
11 according to accepted principles.” Id. If the Court finds the survey admissible, then “follow-on
12 issues of methodology, survey design, reliability, the experience and reputation of the expert,
13 critique of conclusions, and the like go to the weight of the survey rather than its admissibility.”

14 Id. These are issues for the jury, not the court to decide. See id.

15 Lynch’s survey and opinions are subject to exclusion due to their lack of relevance to the
16 pertinent issues in these cases. Defendants argue that Lynch’s survey is relevant to assessing
17 whether some class members reached an agreement over the value of their total loss vehicle. As
18 the Court has explained in ruling on the motions for class certification, the narrow safe harbor to
19 which this issue relates requires Defendants to provide evidence that the claim file contains an
20 express agreement by the insured to the Autosource Report’s use of a typical negotiation
21 discount. (Ngethpharat, Dkt. No. 136 at 13-15.) But Lynch’s survey failed to ask any questions
22 relevant to that narrow issue. Absent are any questions about whether the recipient agreed with
23 the value State Farm came up with for the loss vehicle, whether the person knew about the
24 typical negotiation discount, whether the insured agreed with the typical negotiation discount, or
 whether the typical negotiation discount was applied to the insured’s claim. The same is true as

1 to the “condition deduction” at issue in the Jama matter. The survey’s eight questions merely
2 gauge customer satisfaction generally and Lynch offers no insight into the “agreed value” safe
3 harbor on which Defendants rely. The Court finds that Lynch’s survey and opinions are properly
4 excluded as irrelevant and unhelpful to the trier of fact. See Clicks, 251 F.3d at 1263.

5 The Court otherwise disagrees with Plaintiffs that Lynch’s survey is methodologically
6 flawed. First, the Court does not find that Lynch’s survey was overinclusive. Lynch used the
7 class definitions provided by Plaintiffs, which defined the classes broadly enough to include
8 insureds who were not paid a value based on a typical negotiation discount or condition
9 deduction. That fault cannot be ascribed to Lynch. Second, the Court remains unconvinced that
10 the sample was underinclusive. Plaintiffs argue that Lynch did not know the distribution between
11 former and current insureds and how that impacted the results. But with Defendants’ opposition
12 briefing, Lynch has clarified that the reporting rate was slightly higher for current insureds, but
13 that there were no differences in “satisfaction or in any other survey measure” as between the
14 two population. (Declaration of John Lynch in Opposition to Plaintiffs’ Motion to Exclude ¶ 4
15 (Ngetpharat, Dkt. No. 114-4).) Third, the Court is not convinced that there is a significant flaw
16 due to a nonresponse bias. Lynch has provided additional information about the nonresponse
17 bias, which goes to the weight, not the admissibility of the survey. (Id. ¶¶ 21-33.) While the
18 Court agrees with Defendants on these methodological issues, it does not change the fact that
19 Lynch’s survey and opinions are irrelevant and subject to exclusion.

20 The Court GRANTS Plaintiffs’ Motion and EXCLUDES Lynch’s survey and opinions.

21 **C. Marais**

22 Plaintiffs ask the Court to exclude Marais’s opinions he provided in response to four
23 questions posed by Defendants. The Court agrees.

1 First, the Court finds that Marais's opinions in response to the first two questions about
2 weighting and adjustments are irrelevant and unhelpful to the factfinder. (Marais Report ¶¶ 10-
3 20 (Ngethpharat, Dkt. No. 85-1).) As the Court has explained in ruling on the motions for class
4 certification, the Court has rejected Defendants' arguments that the typical negotiation discount
5 is not an adjustment governed by Section 391, but some form of permissible weighting.
6 (Ngethpharat, Dkt. No. 136 at 15-16.) Marais' opinions in response to the first two questions
7 about weighting and adjustments are therefore irrelevant to this matter and subject to exclusion.
8 See City of Pomona, 750 F.3d at 1403.

9 Plaintiffs also ask the Court to exclude Marais's opinions and criticism of Torelli's
10 damages model as an improper legal opinion. The Court agrees. Marais provides his opinions
11 about he "would expect to find in an expert report on damages," and concludes that "Dr.
12 Torelli's/Plaintiffs' counsel's proposed measure of damages do[es] not conform meaningfully to
13 the standard definition of economic damages." (Marais Report ¶¶ 21-26.) But Marais offers no
14 substantive criticism based on his expertise as an economist to the damages model that Torelli
15 provides. Instead, he opines on what he believes the legally appropriate measure of damages
16 should be. But the correct measure of damages is a legal question for the Court to determine. The
17 Court excludes these opinions as improper legal opinions and ultimately irrelevant.

18 Finally, Plaintiffs ask the Court to exclude Marais's criticism of Harber's opinions as to
19 whether advertised prices reflect the fair market value of a car. Marais provides an academic
20 opinion of the term "fair market value." (Marais Report ¶¶ 27-31.) But Marais's opinions on that
21 term's meaning are irrelevant because the term is defined in and circumscribed by the regulations
22 at issue in this case. To the extent any further definition of the term is needed, it is for the Court
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1 to provide any further clarification, not an expert. The Court finds that Marais's opinion about
2 the concept of "fair market value" would not assist the trier of fact and excludes it.

3 The Court GRANTS Plaintiffs' Motion and EXCLUDES Marais's report and opinions.

4 **D. Harber**

5 Defendants ask the Court to exclude the supplemental declaration of Harber filed with the
6 replies to the motions for class certification. The Court agrees.

7 Plaintiffs retained Harber to provide his opinions as a vehicle appraisal expert. Harber's
8 supplemental declaration responds to Marais's opinions about whether the typical negotiation
9 discount is a form of weighting and not an adjustment. Harber's opinions range from providing a
10 regulatory history, his personal views on how weighting has historically been used under the
11 Washington regulations, and examples of weighting. Ultimately, Harber's opinions on this issue
12 are irrelevant given the Court's determination that the typical negotiation discount is not a form
13 of weighting that might somehow be permitted under the relevant regulations. The Court
14 therefore GRANTS the Motion and EXCLUDES the opinions contained in the supplemental
15 declaration.

16 The Court also notes that Harber offers improper legal opinions—Harber's interpretations
17 of the regulations—and statistical opinions despite having admitted he is not an expert
18 statistician. (See Harber Supplemental Declaration ¶¶ 5-10, 12 (Ngethpharat, Dkt. No. 92);
19 Harber Dep. 126:24–127:21 (Ngethpharat, Dkt. No. 109-1).) While Harber may testify based on
20 his experience as a vehicle appraiser, he cannot offer legal interpretations of the relevant
21 regulations or opinions on which he has admitted he lacks expertise. This is an additional basis
22 on which the Court excludes paragraphs 5-10 and 12 of Harber's supplemental declaration and
23 GRANTS the Motion.

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1 | E. **Torelli**

2 Defendants ask the Court to exclude Torelli's supplemental report filed with Plaintiffs'
3 replies to their motions for class certification. The Court disagrees.

4 Defendants first argue that representative evidence cannot be used to prove liability or
5 damages and that Torelli's opinions try to do just that. But Torelli merely describes a potential
6 methodology using representative evidence to calculate damages, not liability. (Torelli
7 Supplemental Report ¶¶ 3-19 (Ngethpharat, Dkt. No. 88).) As the Court explained in ruling on
8 the motions for class certification, the use of representative evidence in the context of damages is
9 permissible under Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 993 F.3d
10 774, 790 (9th Cir. 2021). (See Ngethpharat, Dkt. No. 136 at 23-24.) And, as the Court has
11 explained, this methodology tracks the damages recoverable under the legal theories Plaintiffs
12 pursue. (See Ngethpharat, Dkt. No. 136 at 21-24; Jama, Dkt. No. 109 at 24-27.) Additionally,
13 Defendants argue that Torelli's report would improperly include persons who suffered no
14 damages and its use of aggregate damages is unreliable. (Mot. at 9-11) But based on the
15 refinement in the class definition, the Court finds no such flaws. Provided Plaintiffs establish
16 liability, the classes will not include uninjured class members.

17 Defendants also attack Torelli's proposed damages model regarding the "condition
18 deduction" that is at issue in Jama. Defendants argue that limiting the class to other those who
19 received a condition deduction improperly creates a "fail-safe class." (Mot. at 10-11.) The Court
20 remains unconvinced. A fail-safe class exists when it "is defined so narrowly as to 'preclude[]'
21 membership unless the liability of the defendant is established." Ruiz Torres v. Mercer Canyons
22 Inc., 835 F.3d 1125, 1138 (9th Cir. 2016) (quoting Kamar v. RadioShack Corp., 375 Fed. App'x
23 734, 736 (9th Cir. 2010)). Here, the Jama "condition deduction" class includes anyone who was
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1 paid a value based on an Autosource Report that included a condition deduction. Identification of
2 those individuals is entirely separate from and not dependent upon Plaintiff Jama's ability to
3 establish liability. The Court rejects this as a basis to exclude Torelli's opinions.

4 The Court DENIES the Motion to Exclude Torelli's supplemental report.

5 **CONCLUSION**

6 Plaintiffs have demonstrated that both Lynch and Marais offer unhelpful expert opinions
7 that are not relevant to the fact finder's ultimate inquiry in these cases. The Court therefore
8 GRANTS the Motions to Exclude Lynch and Marais and EXCLUDES their reports and
9 opinions. Defendants have also shown that Harber's supplemental declaration contains irrelevant
10 and, to some degree, improper opinions. The Court GRANTS the Motion to Exclude Harber's
11 supplemental declaration and EXCLUDES the declaration and the opinions it contains. But
12 Defendants have not convinced the Court that exclusion of Torelli's supplemental report is
13 proper. The Court DENIES the Motion to Exclude Torelli's supplemental report.

14 The clerk is ordered to provide copies of this order to all counsel.

15 Dated July 7, 2021.

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17 Marsha J. Pechman
United States Senior District Judge

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